STATE OF MICHIGAN

COURT OF APPEALS

THE CINCINNATI INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED July 30, 2013
v	No. 309980 Genesee Circuit Court
V. K. VEMULAPALLI, Defendant-Appellant.	LC No. 99-065843-NO

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right the order granting summary disposition in favor of plaintiff, in this action in which defendant sought penalty interest under the Unfair Trade Practices Act (UTPA), MCL 500.2001 *et seq.*, on an insurance claim. We vacate and remand.

This is the third time that this case, which arose out of a declaratory judgment action filed by plaintiff on August 5, 1999, has come before this Court. The procedural history of this case is as follows.

Defendant owned and operated the Genesee Towers building in downtown Flint. Plaintiff was the property and casualty insurer for the building. On August 18, 1988, the building suffered substantial damage from water. Following the loss, defendant made a claim under the insurance policy. Plaintiff rejected the claim, and the parties agreed to submit the claim to the appraisal process. In a series of rulings, which culminated on June 17, 1999, the trial court determined the cash value or replacement cost of certain items. After the umpire's third ruling plaintiff paid all of the items listed, except for the fire alarm system. The umpire had concluded that the fire alarm system had an actual cash value of $32,850 and a replacement cost value of $657,000. On August 5, 1999, plaintiff initiated this declaratory judgment action, challenging the umpire's award of $657,000 in replacement costs for the fire alarm system. The trial court granted summary disposition in favor of defendant, ruling that defendant was entitled to recover $657,000 as the replacement cost of the fire alarm system. Plaintiff appealed that decision to this Court.

At issue in the first appeal was whether defendant was entitled to a judgment for the replacement cost of the fire alarm system. This Court held the following:

> We affirm the trial court's determination that [the] fire alarm system was a covered loss . . . . We reverse the trial court's order granting summary disposition to the extent that it required [plaintiff] to pay [defendant] any replacement cost in excess of the actual cash value that [defendant] had yet to incur. We remand this case to the circuit court to enter judgment in favor of [defendant] for $32,850 (the fire system's actual cash value) *and* any actual replacement costs in excess of that amount. The circuit court may, if necessary, hold an evidentiary hearing to determine the proper amount of the judgment and may order [plaintiff] to pay [defendant] for the actual replacement costs as he incurs the costs. [*The Cincinnati Ins Co v Vemulapalli*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2002 (Docket No. 233235), slip op pp 11-12 (emphasis in original).]

After this Court's remand, defendant moved in the trial court to recover penalty interest under MCL 500.2006 of the UTPA. The trial court denied the motion, stating that interest, instead, was calculable under MCL 600.6013 because the UTPA was inapplicable since the claim was reasonably in dispute (Opinion and Order, entered May 21, 2004).

The evidentiary hearings that this Court referenced when it remanded the case never occurred. Consequently, the parties stipulated to submitting the issue to binding arbitration. The only issue expressly reserved for the court was the issue of interest. The arbitrator held hearings in September 2004 and on May 3, 2005, awarded $579,407.76 to defendant on his replacement cost claim. On May 13, 2005, the trial court entered a judgment in this amount. On May 25, 2005, plaintiff paid the amount of the judgment and obtained a partial satisfaction of judgment.

On June 9, 2005, defendant filed a motion seeking "clarification of interest due." On December 5, 2005, the trial court denied the motion, stating that the interest was to be calculated in a manner consistent with the trial court's prior opinions and orders, which called for interest as provided by MCL 600.6013.

Nearly four years later, on October 19, 2009, defendant again sought to have interest calculated under the UTPA. Plaintiff filed a motion to enforce the court's prior orders regarding interest on November 12, 2009. On December 22, 2009, the trial court entered an order that required plaintiff to pay defendant $205,826.80 in interest pursuant to MCL 600.6013 for the period of time from the date of the filing of the complaint to May 25, 2005. In accordance with that order, plaintiff deposited $205,826.80 with the Genesee Circuit Court Clerk.

On January 26, 2010, defendant filed a claim of appeal with this Court, seeking reversal of the trial court's use of the statutory interest calculation instead of the calculations provided by the UTPA. Plaintiff then filed a cross-appeal, claiming that no interest should have been awarded under MCL 600.6013 or the UTPA.[1] This Court issued its second opinion in this case, ruling that defendant is not entitled to statutory interest under MCL 600.6013, and remanding the

[1] Both parties subsequently filed competing motions for peremptory reversal, both of which this Court denied.

case to the trial court to determine whether plaintiff owed penalty interest to defendant. Specifically, this Court held:

> As a result, *Griswold II* [*Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007)] mandates that penalty interest of MCL 500.2006(4) can apply to first-party claims irrespective of whether the claim was reasonably in dispute. Thus, in the present case, the only issue is whether plaintiff was dilatory. Specifically, penalty interest is to be assessed if a claim is not paid within 60 days of a satisfactory proof of loss being submitted. MCL 500.2006(4). Defendant, on appeal, does not identify that any proof of loss was ever submitted for the replacement of the fire alarm system. Plaintiff argues that this fact alone means that MCL 500.2006(4) cannot trigger and no penalty interest could be due. However, a claimant can be excused from submitting a satisfactory proof of loss if an insurer fails to comply with MCL 500.2006(3). MCL 500.2006(3) requires insurers to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days." . . . . On remand, if the trial court determines that a satisfactory proof of loss was never submitted, then it must then determine whether plaintiff complied with MCL 500.2006(3).[2] If the trial court determines that defendant supplied a satisfactory proof of loss, or that it was excused, the court must then determine whether the claim was paid within 60 days of that proof of loss, and any applicable penalty interest is to be calculated.
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> [2]We note that, in any event, a proof of loss could not have been submitted until after this Court's remand on December 6, 2002, because any liability had not triggered yet because defendant had yet to replace the fire alarm system. *Vemulapalli*, unpub op at 11-12.

On remand, the trial court held a hearing on plaintiff's motion for summary disposition and issued a written opinion granting plaintiff's motion. In its analysis, the trial court found that December 6, 2002, necessarily had to be the starting point for the determination of whether penalty interest is due and, if so, the amount. The trial court determined that because defendant did not submit a satisfactory proof of loss after this Court's December 6, 2002, opinion,[2] he never triggered plaintiff's obligation to pay and, therefore, that penalty interest was not warranted.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes and

[2] This Court noted in that opinion that a proof of loss could not have been submitted until after this Court's remand on December 6, 2002, because any liability had not yet triggered because defendant had yet to replace the fire alarm system.

contracts. *Hunter v Hunter*, 474 Mich 247, 257; 771 NW2d 694 (2009). Additionally, this Court reviews a trial court's decision whether to award penalty interest for clear error. *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002).

Under the UTPA, "when an insurer fails to pay a claim on a timely basis, a claimant may seek penalty interest." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 554; 741 NW23d 549 (2007). MCL 500.2006(1) provides that "[a] person must pay on a timely basis to its insured . . . the benefits provided under the terms of its policy . . . or, in the alternative, the person must pay to its insured . . . 12% interest, as provided in [MCL 500.2006(4)], on claims not paid on a timely basis." MCL 500.2006(3) provides that "[a]n insurer shall specify in writing the materials that constitute satisfactory proof of loss not later than 30 days after receipt of a claim[.]" When an insurance company does not comply with MCL 500.2006(3), the insured is excused from submitting proof of loss and the matter shall proceed as if a satisfactory proof of loss had been submitted. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 486; 717 NW2d 341 (2006). MCL 500.2006(4) provides that "[i]f benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured . . . directly entitled to benefits under the insured's contract of insurance."

This Court directed the trial court on remand to determine whether plaintiff complied with MCL 500.2006(3) by telling defendant in writing, within 30 days of the filing of the claim, what was required of it to show a satisfactory proof of loss. However, the trial court failed to address this question. Instead, the court concluded that plaintiff's obligation to pay was never triggered due to defendant's failure to submit a satisfactory proof of loss after December 6, 2002. While this statement appears to be correct in light of the policy language that plaintiff has no obligation to pay on a replacement cost basis until the lost or damaged property is actually repaired or replaced, [3] it fails to consider whether plaintiff complied with MCL 500.2006(3) and

[3] The insurance policy between plaintiff and defendant provides that in case of a loss to covered property,

> d. We will determine the value of the Covered Property as follows:
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> (1) At replacement cost (without deduction for depreciation) except as provided in (2) through (7) below.
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> (a) You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim on a replacement cost basis if you notify us of your intent to do so within 180 days after the loss or damage.
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> (b) We will not pay on a replacement cost basis for any loss or damage:
>
> (i) Until the lost or damaged property is actually repaired or replaced; and

the effect of the noncompliance, if any, on the payment of penalty interest in this case. Indeed, this is a question that this Court has already determined to be a question for the trial court if the court determined that defendant never submitted a satisfactory proof of loss. Accordingly, we vacate the trial court's opinion and order and again remand to the trial court for the court for a determination. As this Court stated previously,

> On remand, if the trial court determines that a satisfactory proof of loss was never submitted, then it must then determine whether plaintiff complied with MCL 500.2006(3).[2] If the trial court determines that defendant supplied a satisfactory proof of loss, or that it was excused, the court must then determine whether the claim was paid within 60 days of that proof of loss, and any applicable penalty interest is to be calculated.

We remand with instructions to the trial court as follows:

1. First, determine whether the insurer complied with MCL 500.2006(3) and, if not, whether submission of a proof of loss was excused;

2. Second, if the insurer complied with MCL 500.2006(3), determine whether the insured supplied a satisfactory proof of loss as required by MCL 500.2006.

3. Third, if the insured supplied a satisfactory proof of loss or it was excused, determine whether the insurer paid the claim timely under MCL 500.2006.

The trial court's opinion and order is vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

> (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.